

USAWC STRATEGY RESEARCH PROJECT

THE NATIONAL GUARD'S ROLE IN THE GLOBAL  
WAR ON TERROR: IS THE NATIONAL GUARD  
ALSO A LAW ENFORCEMENT COMBAT MULTIPLIER?

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This SRP is submitted in partial fulfillment of the requirements of the Master of Strategic Studies Degree. The U.S. Army War College is accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools, 3624 Market Street, Philadelphia, PA 19104, (215) 662-5606. The Commission on Higher Education is an institutional accrediting agency recognized by the U.S. Secretary of Education and the Council for Higher Education Accreditation.

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U.S. Army War College  
CARLISLE BARRACKS, PENNSYLVANIA 17013

Report Documentation Page			Form Approved OMB No. 0704-0188		
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE <b>18 MAR 2005</b>		2. REPORT TYPE		3. DATES COVERED -	
4. TITLE AND SUBTITLE <b>The National Guard's Role in the Global War on Terror Is the National Guard Also a Law Enforcement Combat Multiplier?</b>				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S) <b>Ward Johnson, III</b>				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) <b>U.S. Army War College, Carlisle Barracks, Carlisle, PA, 17013-5050</b>				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT <b>Approved for public release; distribution unlimited</b>					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT <b>See attached.</b>					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES <b>29</b>	19a. NAME OF RESPONSIBLE PERSON
a. REPORT <b>unclassified</b>	b. ABSTRACT <b>unclassified</b>	c. THIS PAGE <b>unclassified</b>			



## ABSTRACT

AUTHOR: Colonel Ward K. Johnson III  
TITLE: The National Guard's Role in the Global War on Terror: Is the National Guard Also a Law Enforcement Combat Multiplier?  
FORMAT: Strategy Research Project  
DATE: 18 March 2005 PAGES: 31 CLASSIFICATION: Unclassified

As the United States wages the Global War on Terror, National Guard forces of the nation will play a critical role in supporting law enforcement in its role of protecting the people from terror. New methods, both military and civilian will be needed to take the fight to the enemy. Attacks on Americana (our way of life) will continue to evolve. Some observers argue our enemies are using our freedom and system of justice to include our sacred constitutionally protected freedom against us. While most Americans would agree fighting the war on foreign soil is the preferred method, there continuously looms the reality of a repeated homeland attack. The National Guard is a logical force to enhance law enforcement and Department of Homeland Security (DHS) personnel. Civilian law enforcement agencies, to include the Department of Justice (DOJ), the Immigration and Naturalization Service (INS), The Border Patrol and the newly formed Department of Homeland Security (DHS), have been key players in the homeland fight. Adding the National Guard will greatly improve the traditional forces, increasing their capabilities in times of increased threat. If new forces are to be added to the fight, they must be trained in the Fourth Amendment, added to the current force structure, and deployed when the threat condition warrants. This paper will examine the ramifications of the Fourth Amendment to National Guard forces in their homeland security role.



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## THE NATIONAL GUARD'S ROLE IN THE GLOBAL WAR ON TERROR: IS THE NATIONAL GUARD ALSO A LAW ENFORCEMENT COMBAT MULTIPLIER?

Innovative employment of National Guard (NG) forces of the United States will beneficially augment law enforcement agencies fighting the Global War on Terror (GWOT) on American soil. It is important that these NG forces understand that terrorism will evolve and adapt to our known defenses. To remain effective, NG forces must leave behind the old Cold War mentality and evolve to meet a more elusive foe. Smarter and more highly trained NG soldiers will employ new technologies and methods to defeat the enemy. Since most combat arms units will be employed overseas, combat support (CS) and combat service support (CSS) units will probably play a larger role in this mission.

There is little doubt that suspected terrorists attempting to do harm to our society and the American way of life will be apprehended and prosecuted under state and federal laws in furtherance of the Global War on Terror.<sup>1</sup> NG forces will support these missions. In the course of affording these defendants, due process of law, The United States Constitution, The Bill of Rights and the whole myriad of federal *stare decisis* (Latin for 'let the decision stand') will be invoked to protect the very people (terrorists) who sought to destroy our existence.<sup>2</sup> Central to many arrests is the honoring the spirit of the Fourth Amendment.<sup>3</sup>

The Fourth Amendment is a very small clause of the United States Constitution, being roughly fifty words. Nevertheless, it has sparked thought and debate since it was included in the Constitution in the late 1700's.<sup>4</sup> Debate focuses on how much authority the 'state' should have to enter into a persons home and search their effects to determine if a crime has been committed. In spite of this debate, it has survived numerous attacks by both conservative (wanting more search authority) activists and liberal activists (wanting less search authority). This clause has the ageless ability to be retooled and modernized to fit the needs and expectations of our evolving culture and in essence be transformed into a means by which civilized society regulates itself by and through benign governmental institutions.

It is likely that in the next twenty years, during the Global War On Terror, that the Fourth Amendment will once again be 'tailored' to meet the security needs of the citizens that it has protected for over two hundred years. As cases work their way through appeals courts and ultimately establish new law for our country, they will inevitably reflect current events, which will include terrorism. As our nation has come under attack once again, it is likely that the same cases that were thought to restrict the power of the government will expand power of the government and vice versa depending on the needs of the country.

When you hear the words, “the guy got off on a **technicality**,” usually the Fourth Amendment has stymied an otherwise successful prosecution.<sup>5</sup> In reality, very few prosecutions are ever totally dismissed. Public attention to the high profile cases draws disproportionate media attention. This media attention results in a misconception that many criminals get away with their criminal activity.<sup>6</sup>

The GWOT has resulted in thousands of seizures of terror related evidence. A chilling piece of evidence found in numerous seizures are ‘how to’ manuals instructing terror sleeper cells how to use our justice system to their greatest advantage. It is likely that a high number of terror related cases could overwhelm our justice system. If the United States is to continue to make progress in the Global War on Terror (GWOT), state and federal courts around the country are going to have to redefine the Fourth Amendment. The environment in which the redefinition will take place is an age when super-empowered zealots, using terror as a tactic, know United States law better than most attorneys do. Simply put, they will seek to use our system of justice as a weapon against us.<sup>7</sup> Recall that the attack on 9/11 was not completed using their planes. They used our own peaceful technology against us as a weapon. The same could occur in our legal system.

Not surprisingly, but always controversial, the Fourth Amendment has provided less protection to individuals than state constitutional or statutory provisions.<sup>8</sup> An example of this ‘crisis motivated’ swing in the pendulum of justice would be the series of cases during World War II regarding detainment of Japanese Americans. The Japanese Americans were rounded-up, detained and had their property taken with virtually no procedural or substantive due process. Another example of a swelling of federal search and detainment powers was during the American Civil War when President Lincoln detained and searched thousands of Maryland and West Virginia citizens (to name a few) with no probable cause or reasonable suspicion while the country was busy fighting the Civil War. To fully understand the second and third order effects of the Fourth Amendment’s substantive due process protections and vulnerabilities to attack, study must be directed at the actual court cases and their *stare decisis*.<sup>9</sup> Finally, most Fourth Amendment litigation and case law is based on the facts of each case. Factual dissimilarities are usually evident.

These admonitions are included as a signal that misapplications in the context of Fourth Amendment issues are often made--even by bright legal scholars. It will be essential that the NG remain inside the line of the law. Force structure dedicated to the GWOT will need heightened legal training. Search and Seizure focusing on the Fourth Amendment will be critical. The forces trained and employed will have lasting effects on our nation’s history and

case law. This paper will explore the ramifications of the Fourth Amendment to our Constitution on NG forces supporting law enforcement in a new age of our GWOT.

#### **THE FOURTH AMENDMENT**

If guardsmen are to spend time learning about the Fourth Amendment, it only seems proper that they should read it. Therefore, it is presented below in its entirety.<sup>10</sup> The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, to be searched, and the persons or things to be seized.<sup>11</sup>

Cases that grab the attention of the media are cases where the case against an obviously guilty criminal must be thrown out because some rule was violated in the process of evidence seizure. Our country's notions regarding justice and fair play, demand that the government not break the law in order to enforce the law. Therefore, guilty people will go free when we catch bad police breaking the law or violating people's constitutional rights. Throwing out evidence that was seized while violating substantive due process is dealt with in part by the Exclusionary Rule.

#### **THE EXCLUSIONARY RULE**

When the forces of the National Guard are assigned duties such as security guard--at airports, as any type of security force at a base, post, or installation or any type of law enforcement mission, these guardsmen will face the situation of detecting telltale signs of criminal activity. This might be as benign as minors in possession of alcohol might or as sinister as terrorists on their way to plant an improvised explosive device (IED) or at its worst a weapon of mass destruction.

In analyzing Fourth Amendment issues, it is important to distinguish levels of proof. The Fourth Amendment itself requires "probable cause" in order to issue a warrant or make an arrest. Probable cause for arrest or for a search is consistent throughout federal courts. If an arrest is to lead to a successful prosecution, care must be taken to satisfy the requisite level of proof. This is basic substantive due process.

For arrest, there must be a substantial probability that a crime has been committed and the person to be arrested committed the crime. On the other hand, probable cause for search requires a substantial probability that the items sought are the fruits, instrumentalities, or evidence of a crime and the items are presently to be found at a certain place.<sup>12</sup> Articulation of

probable cause by the person making the arrest will allow a search warrant to be issued.<sup>13</sup> The issuing official is normally an unbiased law-trained magistrate judge or state/federal district judge, unless an exigency exist which will be dealt with later. The burden of articulating the requisite level of proof is on the law enforcement officer requesting the warrant.<sup>14</sup>

Nevertheless, there are always exceptions and lesser standards of proof for law enforcement to attain warrants if practicality dictates. An example of this reduction in favor of law enforcement is the reasonable suspicion standard. This lesser standard has evolved out of Fourth Amendment case law. The reasonable suspicion standard was first revealed in the context of modifying substantive due process of the Fourth Amendment in the United States Supreme Court case entitled Terry v. Ohio, 392 U.S. 1 (1968).<sup>15</sup>

Previously, the concept was that the Fourth Amendment only protected places.<sup>16</sup> The United States Supreme Court then clarified this concept by stating that the Fourth Amendment protects people, not places.<sup>17</sup> This concept is often referred to as the Katz standard, from the landmark U.S. Supreme Court case Katz v. United States, 369 U.S. 347 (1967).<sup>18</sup> Under the Katz standard, the Fourth Amendment provides protection to "people" anywhere that person may have a "reasonable expectation of privacy." For example, a warrant may be requested to listen to the illegal conversations involved with a conspiracy to bomb the Pentagon. A warrant must be granted to install a covert listening device at a public telephone booth that officers expect may be used by a suspect (terrorist) to call a co-conspirator (terrorist).<sup>19</sup> It is likely that courts will apply this case in a manner which allows law enforcement to 'let a warrant be issued' to gather evidence in a similarly situated terror prevention operation. Other possibilities for the application of the Katz standard involving terrorism would be hand-held walkie-talkies, cell phones, or text-messaging hand held devices like Blackberries or pagers.

The key evolution of the protection from the listed scenarios is that protection of privacy is tantamount and not the protection of property (the phone booth) in and of itself. It is important to keep in mind that nothing within the Constitution or Bill of Rights mentions anything close to the requirements set out in Katz and Terry. Rather, they are notions of American jurisprudence that have been developed out of the necessity of balancing the greater need for safety from the criminal element and personal rights granted by and through the Constitution and Bill of Rights.

National Guard soldiers finding themselves in these security missions will be successful most of the time if they compile sufficient suspicion and relate these suspicions to law trained prosecutors. If affidavits are supported by the reasonable suspicions of the soldiers, most judges will let the warrants be issued. Most importantly, under scrutiny at suppression hearings, evidence gathered will not be excluded

## **PUBLIC PLACES ARE NOT PROTECTED**

National Guard forces have patrolled public places such as airports and train stations. While most of these missions do not result in the collection of evidence, some patrols will uncover suspicious activity. Since terrorists have chosen to attack public places and places that have high symbolism, the laws regarding these places are under scrutiny--by terrorists and the courts. In a free society, unfettered access to public places is a cherished way of life. Great scrutiny must be taken before any of these rights are further eroded.

The Supreme Court has decided a person does not generally have a reasonable expectation of privacy in public places. For example, household garbage that is placed on the curb or berm for collection has once been in the home, where it receives the highest protected status. However, once a person's garbage leaves the home and is placed on a public berm for collection all expectations of privacy are lost.

The issue of when or how evidence that once enjoyed protection can lose its protection was the central holding in California v. Greenwood, 486 U.S. 35 (1988).<sup>20</sup> Thus, what a person exposes or disgorges to the public (plain view), even if it was once in his home or office, is no longer afforded Fourth Amendment protections. The same rationale applies to property that is abandoned in a public place, such as an airport terminal or on the dashboard of a car being stopped at a checkpoint. Car bombs, suitcase bombs and other disguised IEDs require consideration of further eroding privacy even greater than once thought. For example, if a person wishes to carry a briefcase in public, because it could contain an IED, should the case be subject to search anytime? Depending on the proximity to an airport, this question has been answered. All bags are subject to search. This type of search is called a warrantless search, and there are many examples.

In times of imminent threat of attack, the most likely force deployed to guard public places will be the NG. These forces are usually drawn from nearby armories and deployed with little or no notice. For example, after the 9/11 attacks, forces from the 141<sup>st</sup> Combat Engineer Battalion were in place performing patrolling duties within days of the attack. These soldiers had no law enforcement training and were there to show the public that security measures were being taken rather than to catch terrorists.

## **WARRANTLESS SEARCHES AND THE USE OF DOGS**

The development of new technology is always welcome, but sometimes old ideas like the super-sensitive nose of a dog are cost effective and provide protection from substances that tend to 'gas off' detectable amounts of vapors like tri-nitro-toluene (TNT). Just the presence of

TNT sniffing dogs has a chilling effect on the would be bomber or smuggler. TNT sniffing dogs can be a valuable tool helping DHS screeners find and detain bomber terrorists or people who have residue on their clothes or hands.

The United States Supreme Court has decided that there is no violation of a 'reasonable expectation of privacy' when luggage is subjected to the nose of a trained dog. In United States v. Place, 462 U.S. 696 (1983), federal agents seized the baggage of a suspected narcotics mule and took the bag to another airport, where a narcotics dog reacted positively to one of the bags, and ambiguously to the other.<sup>21</sup> The key point of the case was that **actual seizure** was made **prior** to the officers' developing probable cause to believe that of the bags contained either contraband or evidence of a crime. Thus, the seizure in this case was found unreasonable. However, the Supreme Court concluded that the sniff of the canine did not constitute a search, and that absent the seizure, the mere use of a narcotics dog was a minimal intrusion. After all, the dog was not inside the bag. It was able to detect the drugs by the molecules of the drug that were escaping or gassing off into public space. Thus what is important regarding this case is the precedence of allowing public place searches was upheld and broadened to allow dogs to be at airports to detect prior to a seizure.

The relevance to terrorist bombers is a similar application of the same doctrine. It is easy to see why there has been no successful challenge of the use of 'sniffer' technologies that sample the air around baggage since no actual penetration of the article is taking place, only a sampling of the air surrounding the article. Innovative technology will soon be deployed at most airports that samples the air to detect the TNT in IEDs.

Training of NG units to use dogs and to handle public place patrols could substantially enhance the ability of NG forces to provide more than a show of force during times of imminent threat. One solution would be to include training of this type of mission to more than just military police units like combat service support units in nearby towns.

Trained dogs enhance a foot patrol's entourage. There are serious force structure additions needed to effectively perform this mission by the NG. Many Active Army military police forces are engaged in the overseas missions in support of the GWOT, as well as a large number of NG.<sup>22</sup> Consideration should be given to current force structure. Requirements for additional military police and K-9 units provide a dual use capability. Military police can often find civilian employment in law enforcement. K-9 units can be used by DHS personnel when not being used by the NG.

## FRUITS OF THE FORBIDDEN TREE

The Fourth Amendment has demonstrated its continued efficacy through the exclusionary rule. The exclusionary rule was first developed in Weeks v. United States, 232 U.S. 383 (1914).<sup>23</sup> In that case, the United States Supreme Court held that evidence obtained in violation of the Fourth Amendment is inadmissible in a prosecution for a violation of federal law in a court of the United States. The exclusionary rule was made applicable to state court prosecutions through the Fourteenth Amendment to the United States Constitution.

In the landmark case of Mapp v. Ohio, the Court defined 367 U.S. 643 (1961) further clarification of the exclusionary rule. <sup>24</sup> According to Mapp, evidence that is obtained because of the illegal search is also inadmissible under the derivative evidence rule. The derivative evidence rule is also referred to as the “fruit of the poisonous tree” doctrine (FOTPTD).

Terrorists are likely to be very familiar with the FOTPTD as it serves as an effective defense for eliminating evidence used to convict apprehended suspects. For example, if a governmental officer illegally searches the property of a person, and the person contemporaneously confesses to another crime, evidence resulting from the search, the confession, and all evidence obtained because of the confession would likely be inadmissible in court under the derivative evidence or “fruit of the poisonous tree” doctrine. This is a punitive measure established to deter law enforcement officers from failing to get warrants signed by magistrates when there is no exigency or emergency at the time of the search. It is also aimed squarely at ‘pretext’ situations where law enforcement uses a ruse to make a stop.

A number of exceptions to the exclusionary rule have evolved including the following list of exceptions.

1) Private party searches or searches where the searching party is not an agent or officer of the state or federal government. These are very common when parents, roommates, or guests collect and notify law enforcement of possible criminal activity. 2) Good faith searches, where the law enforcement officer has gained entry or evidence by some other legal means and finds unexpected evidence. As long as the officer was acting in good faith in following the law, the evidence will generally be allowed. 3) Consent searches arise when the suspect actually gives permission to conduct the search. As strange, as it may sound they are very common. 4) Plain view searches arise when law enforcement spots the evidence on a dashboard of a car or in an open door. 5) Search incident to arrest is when the evidence is gained during a ‘patdown’ which is done after arresting a suspect. 6) And, emergencies can be used when life or limb is in danger as well as other dangerous situations where injury could result.

Bear in mind that the facts and circumstances of each situation will determine if an exception to the exclusionary rule will apply. Some of these exceptions, however, are worthy of further consideration.

Foremost, the Fourth Amendment is generally applicable only to government officers or agents and officials that work for state and federal law enforcement. Ordinarily, an illegal search conducted by a private citizen does not result in suppression of the evidence obtained. If, however, the private citizen is working as an agent or informant of the government, the evidence obtained by an illegal search is excludable from trial.

Evidence of a private party search is generally admissible in a federal prosecution; the same evidence may be inadmissible under state constitutional law. Prosecutors will generally bring charges in the jurisdiction where evidence is more likely to be admitted and used to convict the charged defendant. Oftentimes evidence obtained by officials is used exclusively for prosecution in federal courts. U.S. district courts obtain jurisdiction under federal criminal laws. The federal/state distinction is therefore less applicable, as the federal court is not typically bound to apply state constitutional or statutory law in a federal prosecution.

It is interesting to note that no challenges have been made in either the federal court or the state courts raising the issue of NG forces participating in law enforcement operations. Additionally, no constitutional challenges have been filed concerning what status a NG soldiers is in when conducting these missions. The distinction of Title 32, United States Code (state status), or Title 10, United States Code (federal status) to this point has been of no concern. As the GWOT progresses and funding of DHS and Department of Defense (DOD) compete, more scrutiny will likely standardize the status of these soldiers. The preferred status would be State Active Duty or Title 32 because of the plenary authority the imprimatur of federal involvement conveys. But when NG soldiers are needed to perform a law enforcement role, there appear to be adequate 'work-arounds' which satisfy the Posse Comitatus Act yet provide an adequate level of military presence to complete the mission.

Consent searches (which are the type of search common to most aviation scenarios.) are another exception to the exclusionary rule and will be addressed below. Additionally, the good faith exception applies to searches made pursuant to a warrant, and as such, this exception is usually inapplicable to the context of aviation security. The plain view doctrine allows officers to seize items of evidentiary value that are discovered in plain view. Essentially, if the officer observes something that is immediately apparent to be contraband or evidence of a crime, it may be seized without a warrant. However, for the plain view exception to apply, the officer must make his observation from a place where the officer is legally entitled to be.<sup>25</sup> An example

of this plain view doctrine is when careless criminals have failed to sufficiently hide their contraband. The packaging breaks and spills into the open. The spilled contents are thus in plain view of the officers.

Finally, the emergency doctrine allows a search to be made if emergency or exigent circumstances require the search. If additional evidence is then discovered under the plain view doctrine, it is generally admissible. Usually, the emergency doctrine requires an imminent danger to the safety of another person. In the notorious case of People of California v. O.J. Simpson, the trial judge refused to suppress evidence obtained from the defendant's residence when officers suspiciously detected blood in the defendant's vehicle and around his residence. It is widely believed this blood was planted.<sup>26</sup> The court found that an emergency existed. Likewise, in the context of 'public place' security, there must be objective facts that would cause a reasonable person to believe that an emergency exists. Possible exigencies may include 1) potential weapons or explosives, 2) dangerous items, 3) or imminent likelihood of injury to another person. This type of search is also limited by the reasonableness standard of the Fourth Amendment. Therefore, once the emergency has subsided, the search must cease. If the search continues, and new evidence is found, that new evidence will more than likely be excluded.

NG soldiers either Title 10 or Title 32 status will be treated as agent of the federal government or state government, depending on the status of their orders. Their role in any evidence seizure will be treated as if they were trained law enforcement officers. This fact reinforces the proposition that further training is needed to a broader spectrum of NG forces than just military police units.

#### **ROUTINE BORDER SEARCHES AND INTERNATIONAL FLIGHTS**

In addition to performing roving patrols, NG forces may be needed to assist DHS in their continuing mission of keeping our airports capable of handling the large number of travelers in times of imminent threat. It is reasonable to assume that terrorists will try to disrupt our air transportation system during times of peak travel. NG soldiers could quickly be employed to enhance an overwhelmed DHS security detail.

Routine searches at international borders and airports with international connections are permitted as an inherent right of a sovereign to protect its territory from outside infiltration. Such searches may take place at the physical border of the territory, or at the place where a foreign passenger arrives, such as a pier or an international airport. In circumstances where the border search occurs at the place of embarkation rather than the actual border, the courts refer to the

place of the search as the “functional equivalent” of a border. By agreement with Canada, US Customs and Immigration personnel clear passengers before boarding US-bound planes at the airports in Montreal, Ottawa, Toronto, Winnipeg, and Vancouver. The routine border search is an administrative search that is allowable even without probable cause or a warrant. Some courts suggest that reasonable suspicion is required, while other courts indicate no suspicion whatsoever is necessary to conduct a routine border search. The consent of the traveler is automatically given if the person wants to travel to the foreign country.<sup>27</sup>

Historically, courts have limited the scope of a border search. Therefore, x-ray examinations, or searches of purses, suitcases, briefcases, luggage, or handbags are typically classified as routine. Likewise, the courts consider it reasonable to briefly detain a person while his or her personal effects are searched. The freedom given up is thought to be worth the increased level of protection afforded the traveling public. Patdown searches now being conducted have been initiated since 9/11. The increased scrutiny and loss of privacy has been the topic of interesting debate, but not the target of civil liberty groups yet.

Within the context of aviation security, searches of both incoming and outgoing effects at the “functional equivalent” of the international border have been upheld on the mere suspicion standard. However, once the initial search is completed, a higher level of proof will be needed in order to justify a further detention or search. In such circumstances, strip searches, body cavity searches, or other more intrusive searches must be supported by reasonable suspicion or probable cause.<sup>28</sup> The country of Jamaica was scrutinized by the United States State Department for an inordinate number of strip searches and body cavity searches on young attractive women. These selective searches were immediately stopped upon protest.

Employment of NG forces may not be a long-term solution to the lack of effective security at our borders and virtual borders. During periods of peak travel or imminent attack, properly trained NG soldiers could enhance DHS details and speed up border processes. The probable objective of a terrorist attack may not be the attack itself. Rather, the objective could be the damage done to the United States economy, resulting from the disruption of interstate commerce.

## **STOP AND FRISK**

The reasonable suspicion standard, referred to earlier, was the landmark constitutional case entitled Terry v. Ohio, 392 U.S. 1 (1968).<sup>29</sup> In Terry, the United States Supreme Court allowed a limited search of a person to be predicated on the lesser standard of reasonable suspicion, rather than the higher standard of probable cause as previously required by the

Fourth Amendment. Terry allows officers to briefly stop and detain a person if there are specific articulable facts that indicate criminal activity is at hand. Once stopped, an officer is authorized to conduct a limited patdown search for weapons if there is a reasonable suspicion that the person is armed and dangerous. Such searches are limited in scope to searches for weapons and are sometimes called search incident to arrest--even though an arrest has not or will not occur. The tantamount concern for this type of search is the safety of the officer.

In Terry, the Court applied a balancing test whereby the danger posed to police officers on a daily basis was balanced against the Fourth Amendment freedom from unreasonable searches. The Court found that the governmental interest justifies a minimal intrusion, so long as the scope of the search is confined, and the detention and search are based on objective and articulable facts that would cause a person to believe that criminal activity is at hand or that a person is armed and dangerous. The Court has also held that if an officer discovers contraband while in the course of a proper Terry search, and the incriminating nature of the contraband is immediately apparent, that evidence will be admissible in court. Therefore, if during a routine examination by consent, a traveler is found to have contraband in his baggage, a further patdown search would be justified, and a plastic firearm, detonator, block of TNT or some other evidence found, would most likely be admissible evidence. The ramifications of this seizure to the NG would be identical to law enforcement. NG forces, once again, would supplement DHS and local law enforcement in the aforementioned venues conducting stops.

#### **ADMINISTRATIVE SEARCHES**

Administrative searches are generally conducted as part of a regulatory scheme, enacted for an administrative purpose rather than for discovering evidence of a crime, contraband (TNT), or as part of a criminal investigation. In the context of aviation security, airport screening stations are designed to prevent passengers from boarding planes with weapons, explosives, or dangerous items. These stations were not designed as a means of apprehending an individual or as an effort to discover evidence of crime. As such, the courts repeatedly hold that airport screening is administrative in nature and the search need not be based on probable cause or reasonable suspicion. The right of the traveler is given up by the passenger in order to fly with peace of mind knowing each passenger has been screened.<sup>30</sup>

As with all searches, however, administrative searches must meet the reasonableness standard of the Fourth Amendment. Much like the "Terry" patdown search, administrative searches, such as airport screening, must be completed within the narrow limits for which the search is administratively enacted.<sup>31</sup> For example, the purpose of the airport screening

procedure is to ensure that passengers do not board an aircraft with weapons. Screening of all people in the terminal building would be overly broad, unreasonable and excessively expensive under the Fourth Amendment. However, screening all people who board an aircraft or screening all people who enter the boarding area is, on the other hand, reasonable and within the parameters for which the administrative search was designed.

Those authorities conducting routine administrative searches cannot turn an administrative search into a general search for evidence of a possible crime. Thus, the search is limited to weapons and instruments that could be used as weapons. Searches outside the boarding area must be based on probable cause, or specific articulable facts warranting a limited Terry type search.<sup>32</sup> The single objective for administrative searches in this context must be to ensure passenger safety, and not to discover or seize evidence of a crime. Since this type of search allows such close inspection without any probable cause or reasonable suspicion, it has been a ripe ground for litigation in American courts. Administrative searches also offer an alternative. For example, should a passenger refuse to submit to the administrative search of his person or effects prior to boarding an airplane, he may do so. That person then cannot board the aircraft, in accordance with FAA regulations.

As administrative searches are a part of a screening activity, the role played by NG forces would be in support of current DHS and Department of Justice personnel. This section is included to illuminate the wide variety of functions that are necessary to adequately support the missions to enforcement agencies

#### **CONSENT SEARCHES**

Passenger screening is often upheld based on consent.<sup>33</sup> Like almost all constitutional provisions, the person who is searched or whose property is seized may have waived constitutional protection from search and seizure that is guaranteed by the Fourth Amendment to the United States Constitution in exchange for a benefit. The principal Supreme Court Case in the area of consent searches is Schneckloth v. Bustamonte, 412 U.S. 218 (1973).<sup>34</sup> In order to be effective, consent must be freely, knowingly and voluntarily given. Therefore, duress, coercion, or other factors may invalidate a search predicated on consent. The Supreme Court has held that a person need not be advised of his or her right to refuse the search in order for the consent to be effective.<sup>35</sup> However, the courts are directed to look at all the circumstances surrounding the facts of the search in order to ascertain whether consent was freely and voluntarily given or extracted under undue pressure to duress.<sup>36</sup>

Thus, an admonition that a person is free to refuse consent will increase the likelihood that a court will determine consent was in fact freely and voluntarily provided. Since all passengers including terrorists must buy an airline ticket, it is a reasonable extension of this doctrine that companies could request consent to full searches of the passenger, his or her baggage, and carryon. The drawback of course would be the enormous drain on DHS personnel this complete search would require.

The obvious source of additional personnel would be the NG forces that live around these facilities. Short-term deployments of NG soldiers that are already trained would increase capabilities quickly. A rapid increase in the number of personnel would ameliorate the impact of heightened searches.

## **PROFILING**

Recent litigation and law enforcement practice has focused on the process of profiling passengers.<sup>37</sup> Highly researched and studied lists of possible behaviors, appearances, and attendant circumstances have been developed to provide guidelines for DHS aviation security professionals regarding profiling of passengers. Often these factors are directly converse to one another. For example, some factors may include: the passenger was the first to deplane, or he was the last to deplane; the passenger purchased one-way tickets, or he/she purchased round trip tickets; the passenger carried new luggage, no luggage or only a gym bag; and the passenger acted nervously, or he acted too calm.<sup>38</sup>

Looking at any of the attendant circumstances alone, a passenger who fits a particular profile does not amount to reasonable suspicion. However, the Court has held that objectively suspicious or evasive behavior may rise to the level of reasonable suspicion.<sup>39</sup> This was evident in the recent United States Supreme Court case of United States v. Sokolow, 490 U.S. 1 (1989).<sup>40</sup> Sokolow and a female companion flew from Honolulu to Miami and returned after only a 48-hour stay. Sokolow was stopped by DEA agents who knew that he was approximately 25 years old, that he had paid \$2100 in cash for his tickets (from a roll of \$20 bills that appeared to be approximately \$4000), that he was wearing a black jumpsuit and gold jewelry, and he appeared nervous. Sokolow also provided a false name. The Supreme Court held that although all of the activity was lawful, it amounted to reasonable suspicion.

Achieving the standard of reasonable suspicion does not mean that the suspect is now arrested. It merely means that now law enforcement can take additional measures to conduct a more invasive search.<sup>41</sup> Any additional searches of this nature would have had impacted the infamous 9/11 attack. Since the profile would have identified the terrorist and closer scrutiny

and questioning would have discovered nervous behavior or other telltale signs of criminal activity.

Deployment of NG forces at airports may not catch every terrorist. It will send a message that the United States is taking terrorism seriously. Additional roving patrols that have been trained to spot the profile of a terrorist increase the likelihood that suspicious behavior will be spotted.

Important for the Department of Homeland Security (DHS), the INS and the Border Patrol is the ability to identify objective facts which, when combined with other lawful facts, that amount to reasonable suspicion. If the facts do provide reasonable suspicion, a limited search may possibly be conducted.

## **TECHNOLOGY**

The use of technology in aiding DHS security professionals continues to develop rapidly. Courts faced with this issue have generally upheld the use of x-ray machines to scan carry-on baggage. A further search upon detection of a suspicious object is also generally permitted. Here again, the reasonableness requirement of the Fourth Amendment requires that the subsequent search extend only as far as is reasonably necessary to confirm or dispel the suspicions resulting from the x-ray examination. This would be asking a passenger to turn on their computer or cellular phone to verify, it is what it appears to be and not a painted piece of plastic explosive or a chunk of carved cocaine painted to look like a phone.

The United States Supreme Court has indicated subsection of checked baggage to a canine sniff test for narcotics does not violate a person's reasonable expectation of privacy. However, a closer examination of luggage would constitute a limited seizure. A limited seizure of checked baggage must be based upon reasonable suspicion and is subject to the reasonableness requirement of the Fourth Amendment.<sup>42</sup> If, however, checked baggage is subjected to search on the basis of a profile or a set of specific facts about a particular passenger, the courts will generally require an exigency or search warrant to conduct a search of the baggage.<sup>43</sup>

## **CONCLUSION**

National Guard soldiers have proven their capability to support both military missions and domestic missions in the GWOT. In order to fully support the numerous missions that the Nation Guard could assume, focused training is needed. This training is a prerequisite for all law enforcement personnel. It should also be required for a broader range of National Guardsmen.

CS and CSS Soldiers do not need to be made into police officers or lawyers. NG soldiers must have additional training. They should have a working knowledge of basic Fourth Amendment search and seizure law. Having a working knowledge of search and seizure law is akin to the riot training that the National Guard currently receives in addition to what Regular Army trainees receive while at basic training. Speed is of the essence. When current events dictate a heightened level of security where NG forces are needed, it is too late to begin training. Increasing the numbers of trained personnel will ensure there will be an adequate reservoir available to DHS and law enforcement agencies when they are needed.

The huge loss of life from the 9/11 attack was the largest single loss of life since the attack on Pearl Harbor in 1941. But, the 9/11 attack also had tremendous damage to the United States and global economy caused by the nation's airports, borders and centers of interstate and international commerce closing while security forces were deployed. The nation lacked adequately trained personnel to perform this mission. In many cases, the deployed forces were little more than a show of force. Properly trained NG soldiers would make a substantial and beneficial contribution to our national needs for security.

There are going to be subsequent attacks on American soil during the GWOT. The terrorist threat will most likely focus its efforts where our society is most vulnerable, our civil liberties, and our open systems of commercial activity. If the Fourth Amendment is to remain a viable doctrine of jurisprudence, it will need to be applied to the new set of circumstances that face our nation in this time of attack.

It is always easy to make a recommendation to increase force structure. However, if change force structure is to make an impact the resulting change needs to be narrowly tailored to a specific purpose. The purpose of additional force structure for the NG would be to better fight the GWOT. Additional forces should have a direct ability to contribute forces to that effort. Thus, force structure change is needed.

NG forces need legal training at levels beyond what has traditionally been acceptable. Knowledge of law enforcement operations concerning arrest, detainment, search, and all other areas of Fourth Amendment substantive due process are critical. With NG forces available from surrounding communities, DHS, DOJ, and the INS can tap into these military reserves when the threat is elevated. When the threat diminishes, NG forces can be quickly deactivated and returned to their civilian functions. NG forces can also be used by law enforcement in other complimentary ways to enhance detection of terrorists like using roving K-9 patrols at airports and critical hubs of transportation.

Being able to mobilize these, forces quickly under either Title 10 or Title 32 of the United States Code will mean the forces can deploy faster to where we need to take the fight. The costly delays and economic hardships caused by the 9/11 attack cannot be repeated. Losses to interstate and World commerce would have been much less had there been trained NG soldiers ready to deploy immediately after the attack.

Finally, is the issue of Constitutional challenge to the use of NG forces in law enforcement. No challenges have been made in either the federal court or the state courts raising the issue of NG forces participating in law enforcement operations. Additionally, no constitutional challenges have been filed concerning what status a NG soldiers is in when conducting these missions. Most state and federal agencies that have employed NG forces have been very happy to have the extra help.

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## ENDNOTES

<sup>1</sup> Many non-law trained people forget that the United States is comprised of 50 separate sovereign states that delegated power to the federal government. Therefore, bear in mind that cases originating out of all 50 states can and do wind their way up the appellate courts--both state and federal--and are heard by the United States Supreme Court. In so doing those cases become the law of the land.

<sup>2</sup> The United States Constitution and the Bill of Rights will be referred to as The Constitution.

<sup>3</sup> Both substantive and procedural due process of law are important constitutional concepts. However, for the purpose of this paper mainly substantive due process issues will be examined.

<sup>4</sup> See following pages for the Fourth Amendment exemplar.

<sup>5</sup> The protections provided by the legal scholars of early America are truly inspired and yet unsurpassed in their efficacy and equity by any other successful government.

<sup>6</sup> During my 17 years of criminal defense practice, over 90 percent of prosecutions resulted in some sort of conviction. Most prosecutions however resulted in a lesser-included offense being the ultimate conviction.

<sup>7</sup> It is interesting to note that in numerous seizures of terrorist hideouts, headquarters and sanctuaries, 'how to manuals' recovered always dedicate chapters to simple, succinct and effective legal advice for sleeper cells to instruct their 'ner-do-wells' on how to best use the constitutional protection against us.

<sup>8</sup> As the fifty states all have their own constitutions; many states have increased the burden on law enforcement in the areas of substantive due process.

<sup>9</sup> The Latin terms *stare decisis* literally interpreted into English means 'let the decision stand' and is an age old tradition in American jurisprudence whereby a case with similar issues and facts can be compared 'on point' to subsequent cases.

<sup>10</sup> As an aside, when I attended law school in 1986, I was shocked to learn that only three people in my Constitutional Law class had read the Constitution.

<sup>11</sup> The Fourth Amendment of the United States Constitution, The National Archives, Washington, D.C.

<sup>12</sup> This definition is a definition that I based on knowledge of the Model Penal Code and numerous criminal codes of various jurisdictions and 17 years of criminal law practice.

<sup>13</sup> The hope is that the unbiased magistrate will protect the rights of the potential suspect. In practice, I have found that the unbiased magistrates give great deference to law enforcement.

<sup>14</sup> Remember, this warrant will be further examined during the pretrial stages of prosecution and the underlying reasons for the warrant will be intensely scrutinized by the defense attorney

and the new trial judge. Many prosecutions fail at this level if defense attorneys prove that the arrest was based on a pretext and not good probable cause or reasonable suspicion.

<sup>15</sup> Terry v. Ohio, 392 U.S. 1 (1968).

<sup>16</sup> The protection of places arises out of common law where a man's home was his castle. The highest degrees of protection arise out of this notion.

<sup>17</sup> The modification still protected a man 'castle' but not as much, if he (the king) was not home.

<sup>18</sup> Katz v. United States, 369 U.S. 347 (1967).

<sup>19</sup> In Katz the facts of the case actually dealt with the use of a covert listening device.

<sup>20</sup> California v. Greenwood, 486 U.S. 35 (1988).

<sup>21</sup> United States v. Place, 462 U.S. 696 (1983).

<sup>22</sup> First, the National Guard Worldwide Individual Augmentee System (WIAS) lists numerous positions for NG soldiers to go into the Active Army on 'short tours'. Second, military police MOSs were included in the Stop loss program. Finally, numerous news reports, magazine articles, and opinion editorials focused on the lack of police forces in Iraq. <https://www.perscomonline.army.mil/opcol/WIAS.htm>; Internet; accessed 14 March 2005.

<sup>23</sup> Weeks v. United States, 232 U.S. 383 (1914).

<sup>24</sup> Mapp v. Ohio, 367 U.S. 643 (1961).

<sup>25</sup> The officer can be 'where he is' either by consent or by fiat of his duties.

<sup>26</sup> People of California v. O.J. Simpson, California Reports, 1995.

<sup>27</sup> This consent is found on the passenger's ticket. Although written in very small print, all passengers must give up certain freedoms in order to board a commercial aircraft.

<sup>28</sup> This type of invasive search is usually given much scrutiny after the fact in an effort to discourage pretext searches.

<sup>29</sup> Terry v. Ohio.

<sup>30</sup> See footnote 29 and 34.

<sup>31</sup> Terry v. Ohio.

<sup>32</sup> Terry type limited searches then when successful lead to the discovery of admissible evidence when probable cause to search could be clearly articulated as a reasonable suspicion of law enforcement.

<sup>33</sup> Consent to personal search is given by every passenger as one of the terms and conditions of purchase when an airline ticket is bought.

<sup>34</sup> Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

<sup>35</sup> Ignorance of the law, in this case, is no defense. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

<sup>36</sup> This is called the totality of the circumstances test. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

<sup>37</sup> Profiling has been a practiced used from the early days of our nation. It is racial profiling that raises the ire of civil liberty groups and the insidious uses that legitimate profiling may be used for racial purposes.

<sup>38</sup> Since most of the profiling data bases were developed from criminal law enforcement, civil liberty groups have objected to the lists based on racial and other suspect class discrimination.

<sup>39</sup> Objective suspicion can change from law enforcement officer to law enforcement officer. A veteran officer may well be able to articulate reasonable suspicion where an inexperienced officer may not.

<sup>40</sup> United States v. Sokolow, 490 U.S. 1 (1989).

<sup>41</sup> If any of the terrorists that took part in the 9/11 attack had been given scrutiny, it is highly likely that their involvement in the plot would have ended since the additional time taken to conduct the increased search would have caused a missed plane.

<sup>42</sup> Reasonable suspicion is a higher standard of proof than reasonable articulation. One must be able to reasonably articulate in order to communicate reasonable suspicion.

<sup>43</sup> If the condition of exigency exists, a warrantless search may be conducted. Most warrantless searches are the topic of close scrutiny by defense attorneys.



## GLOSSARY

NG	National Guard
CS	Combat Support
CSS	Combat Service Support
DHS	Department of Homeland Security
DOD	Department of Defense
GWOT	Global War on Terrorism
NGB	National Guard Bureau
NSS	National Security Strategy
OPTEMPO	Operations Tempo
RC	Reserve Component
U.S.	United States



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